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IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE THE CITY OF NEW YORK, THE CITY OF BALTIMORE, THE CITY OF BOSTON, THE CITY OF BURLINGTON, THE CITY OF DAYTON, THE CITY OF MADISON, THE CITY AND COUNTY OF SAN FRANCISCO, AND TRAVIS COUNTY, TEXAS OFFICIALS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT[1]

Amici are a coalition of cities and local government leaders from across the United States that support women's access to safe and legal abortion services. In recent years, states have enacted a growing number of abortion restrictions that have closed, or threaten to close, a record number of abortion services providers throughout the nation. The remaining clinics and hospitals that continue to offer abortion services are primarily located in cities and other metropolitan areas.

Amici submit this brief to warn this Court about the consequences of upholding abortion regulations that drastically diminish women's access to abortion services in the areas where they reside. In analyzing the burden of such laws, this Court should not ignore the hardships imposed when women are compelled to travel long distances to an ever-dwindling number of clinics in cities and metropolitan areas, often out-of-state, to exercise their constitutional right to reproductive freedom.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. All counsel of record consented to the filing of this brief.

Even if women are not deterred or prevented from seeking abortions by the absence of nearby clinics, the burden of restrictive state abortion laws is not geographically confined. The spill-over harms extend to cities and counties where clinics remain open—both in states that have enacted restrictive laws and in neighboring states without similar restrictions. An influx of women seeking time-sensitive abortion services at a diminishing number of clinics and hospitals will jeopardize timely access to vital reproductive healthcare to millions of amici's residents.

This is neither hyperbole nor speculation. In some parts of the country, practical access to legal abortion services may already be worse today—some states are down to only one abortion clinic—than at any point since this Court recognized a constitutional right for women to choose abortion in *Roe v. Wade*, 410 U.S. 113 (1973). Amici have firsthand experience with the desperate measures that women will take to exercise reproductive autonomy.

Before the constitutional right to abortion was established, New York City was one of the few places where women could obtain safe and legal abortions. Hundreds of thousands of women from all over the country, including over 3,400 from Texas, traveled to New York City seeking access to abortion services. The resulting delays in accessing services endangered women's health, and the vast influx of women from all over the country strained

the City's ability to meet all the healthcare needs of residents as well as non-resident women seeking abortion services.

Upholding the Texas law would give state legislatures a template for returning the nation to pre-*Roe* days. Already today, tens of thousands of women travel out of state every year to access abortion services that are unavailable to them in their home states. Countless more travel long distances in-state because services are unavailable anywhere near their hometowns. These numbers exclude the most vulnerable: adult and teenage women who lack the financial resources to travel, or who are in abusive relationships that prevent them from leaving home.

This Court has never conditioned the exercise of a fundamental right on an individual's ability to travel hundreds of miles, let alone to another state. Yet history confirms that such travel, or dangerous self-help measures, may be the only options for women if state-imposed obstacles to abortion are permitted to proliferate. Amici are committed to women's rights, but local support for accessible abortion services cannot ensure reproductive autonomy for women throughout the country. The constitutional right to abortion demands more than isolated islands of reproductive autonomy, in only certain cities, counties, and metropolitan areas, that may not be readily accessible to the vast majority of this nation's women.

ARGUMENT

I. The Recent Proliferation of Abortion Restrictions Threatens to Return the Nation to Pre-*Roe* Days.

Although forty years have passed since this Court decided *Roe v. Wade*, the centrality of abortion to reproductive freedom has not changed. Today, almost half of the more than 6.5 million pregnancies each year are unintended, and almost half of these end in abortion.[2]

In recent years, certain states have enacted a growing number of abortion restrictions. The Texas law in this case follows a familiar pattern of restrictive abortion laws targeted at abortion providers. These laws have forced a record number of clinics to close, and have deterred new clinics from opening in the first place, particularly outside of cities and densely populated areas.

- In five states—Mississippi, Missouri, South Dakota, North Dakota, and Wyoming—only one clinic offering abortion services remains open.[3]

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[2] *See Unintended Pregnancy in the U.S.*, Guttmacher Inst. (July 2015), http://bit.ly/1OCX6af.

[3] *See* Esmé E. Deprez, *The Vanishing U.S. Abortion Clinic*, Bloomberg View (Dec. 8, 2015), http://bv.ms/1Pozw33.

- If Texas's law is upheld, 10 or fewer of the more than 40 clinics that existed prior to the law's enactment will remain open in that state.[4]

- Over the past two years, Ohio has seen its number of clinics drop from 14 to just nine statewide.[5]

Restrictive abortion laws—like those that require physicians performing abortions to maintain hospital admitting privileges, or require abortion clinics to comply with costly standards applicable to largely for-profit ambulatory surgery centers—increasingly relegate clinics to cities and metropolitan areas. This is exacerbated by a number of related economic and social factors. First, hospitals in rural areas are closing at increasing rates. Second, many clinics are also non-profit, making them reliant on the larger client-base and operating efficiencies only available in more densely populated urban areas. This has proven true in Texas. If the challenged law were to go into full effect, the only abortion facilities that would be able to provide abortion care on a regular basis are those in Texas's four largest metropolitan

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[4] *See* J.A. 1429-34.

[5] *See* Amanda Seitz, *Abortion Clinic Stops Procedures, 9 Facilities Remain in Ohio*, Dayton Daily News (Aug. 21, 2014), http://bit.ly/1JhCXud.

areas: Austin, Dallas/Fort Worth, Houston, and San Antonio.[6]

While restrictive abortion laws are enacted on the state level, the impact of clinic closures is experienced locally. Clinics and other abortion providers primarily serve local residents, and to the extent reproductive services are publicly funded, they are often provided through local hospitals and clinics. From amici's perspective as local governments, the proliferation of recent abortion restrictions threatens to return the nation more and more to pre-*Roe* days when women could readily access abortion services only in a few jurisdictions. As explained below, women are endangered by a constitutional scheme that compels them to travel to faraway places to obtain safe and legal abortions. Such a scheme also undermines the efforts of cities and counties to meet the healthcare needs of their own residents.

II. New York City's Pre-*Roe* Experience Shows How Restrictive Abortion Laws Endanger Women's Health and Lives.

New York City's experience before *Roe* offers a cautionary tale about the costs of a system in which local abortion services are unavailable in many places. As restrictive abortion laws spread across

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[6] *See* J.A. 1429-34.

the country, we are returning to a patchwork landscape of abortion access that endangers women and strains the resources of those jurisdictions that protect reproductive rights.

A. Upon Legalization, Women Flooded New York City in Search of Safe and Legal Abortion Services.

Before New York State became one of the first jurisdictions in the United States to legalize abortions, New York City faced a public health crisis. An estimated 50,000 women were having clandestine abortions every year.[7] As a consequence, abortion-related deaths and complications were commonplace.[8]

That changed in 1970, when New York State liberalized its laws to allow abortions up to 24 weeks after conception, or at any time thereafter to protect a woman's life.[9] As abortion services

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[7] *See* Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in N.Y. City Before Liberalization of the Abortion Law*, Family Planning Perspectives, May-June 1976, at 125, 125.

[8] *See id.*; Jean Pakter, *et al.*, *Impact of the Liberalized Abortion Law in N.Y. City on Deaths Associated with Pregnancy: A Two-Year Experience* ("*Impact of Liberalized Abortion Law*"), Bulletin N.Y. Acad. Med., Sept. 1973, at 804, 804-05.

[9] *See* N.Y. Penal Law § 125.05(3).

became legal and accessible for the first time, routine abortion-related deaths and complications became a thing of the past.[10] Still, women often had to travel to the few places where services were available, because many states still restricted abortion. By the year before *Roe*, about 40% of all legal abortions performed in the United States were performed on women outside of their state of residence.[11]

Because New York City offered abortion services to all women, regardless of their state of residence, it quickly became a national refuge for reproductive freedom.[12] In just two-and-a-half years—between New York's legalization of abortion and this Court's decision in *Roe*—around 350,000 women traveled to

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[10] *See* Polgar & Fried, *supra* note 7 at 125; Pakter, *Impact of Liberalized Abortion Law*, *supra* note 8 at 808-10.

[11] *See* Nanette J. Davis, *From Crime to Choice: The Transformation of Abortion in America*, at 228 n.8 & tbl. 10.1 (1985) (estimating that, in 1972, 43.8% of abortions were performed outside patient's state of residence).

[12] In addition to being a moral failing, a residency requirement would have run afoul of the constitutional command that non-residents be placed on equal footing when it comes to such services. *See Doe v. Bolton*, 410 U.S. 179, 200 (1973).

the City for abortions.[13] To give a sense of scale, this number is equivalent to the *entire* female population of Vermont traveling to the City to obtain abortions.[14]

During those pre-*Roe* years, three out of every four abortions in the country were performed in New York State, and the vast majority of them occurred in the City.[15] Nine out of every ten abortions obtained by Texan women were performed not in Texas, but in New York.[16]

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[13] *See* N.Y. State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in N.Y. State: Jan.-Dec. 1972*, at tbl. 6 (Jan. 1974); N.Y. State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Reported in N.Y. State*, at tbl. 5 (Apr. 1971); N.Y. City Dep't of Health, *N.Y. City Health Dep't Study Indicates Nearly Half Million Abortions to City Residents Since 1970 Legalization*, at 1 (Aug. 4, 1977); Ryan Lizza, *The Abortion Capital of Am.*, N.Y. Magazine (Dec. 12, 2005), http://nym.ag/1UGhH2w.

[14] U.S. Census Bureau, *Age and Sex Composition: 2010*, at 7 (May 2011), http://1.usa.gov/1mYzQh3.

[15] *See* Ted Joyce, *et al.*, *Abortion Before & After Roe*, J. Health Econ., Sept. 2013, at 804, 807.

[16] *See id.* at 808.

Women made the trek from every state in the union.[17] More than 20,000 came from Illinois, more than 19,000 from Michigan, more than 18,000 from Ohio, and more than 13,000 from Florida.[18] Some 120,000 women—just a slice of the total influx—collectively traveled more than 110 million miles.[19] That is the equivalent of traveling to the sun, and then circumnavigating it six times.

Of course, nothing changed for the innumerable women who lacked the resources to travel to New York City. These women—disproportionately women of color[20]—were left to choose between carrying a child to term and resorting to clandestine abortions or self-help measures like coat hangers, knitting needles, and the like.[21]

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[17] *See* David Harris, *et al.*, *Legal Abortion 1970-1971: The N.Y. City Experience*, 63 Am. J. Pub. Health 409, 410 (May 1973).

[18] *See* David A. Grimes & Linda G. Brandon, *Every Third Woman in Am.: How Legal Abortion Transformed Our Nation* ("*Every Third Woman*"), at 24 (2014).

[19] *See id.*

[20] *See* Harris, *supra* note 17 at 413-14; Davis, *supra* note 11 at 199 (noting that non-residents making use of New York abortion availability were 87.2% white, in contrast to in-state users, of whom 44.9% were white).

[21] *See* Lizza, *supra* note 13.

B. The Influx of Out-of-State Women Strained New York City's Resources and Endangered Women.

The surge of women traveling to New York City for healthcare had no historical precedent. The *majority* of women seeking abortion services in the City were traveling from elsewhere. Six out of every ten abortions in the City were being provided to non-residents.[22] Despite extensive preparations, the number of women seeking abortions exceeded the capacity of the City's healthcare system by a wide margin.[23] Within just two weeks of legalization, around 2,500 women sought abortions in City hospitals that were equipped to meet less than half that demand.[24]

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[22] In 1971, 137,172 of the 206,673 abortions performed in New York City, or about 66%, were provided for out-of-state women; in 1972, 130,592 of 203,247, or approximately 64%, were for nonresidents; by 1974, the year after *Roe*, 32,712 of 120,829, or 27%, were for out-of-state women. *See* Jean Pakter, *et al.*, *Legal Abortion: A Half-Decade of Experience*, Family Planning Perspectives, Nov.-Dec. 1975, at 248, 248-49 & tbl. 2; *see also Grimes*, *supra* note 18 at 22-23; Harris, *supra* note 17 at 409; Jean Pakter, *et al.*, *Surveillance of Abortion Program in N.Y. City*, Bulletin N.Y. Acad. Med., Aug. 1971, at 853, 866.

[23] *See* Bellevue Hosp., *Some Thoughts on the Abortion Crisis in N.Y. City*, at 1 (July 31, 1970).

[24] See Dierdre Carmody, *Abortion Facilities Under Strain*, N.Y. Times (July 19, 1970), http://nyti.ms/1NAuEWS.

The backlog was immediate, and the amount of time that residents and non-residents had to wait for abortions swelled. In hospitals where demand was particularly high, waiting times rose to six weeks, a prohibitive length of time for most women, but especially for those out-of-state women who had already spent considerable time gathering funds for bus tickets, lodging, childcare, and other expenses.[25] The upshot was that non-residents often received later and more complicated abortions than residents.[26] For some, a legal abortion was no longer possible, requiring them to face the much higher health risks of childbirth.

In time, New York City successfully addressed many of the problems caused by the tremendous spike in the non-resident patient population. But the success was not without a price—both for the availability of care in general and for the women who were forced to travel long distances to get abortions. And the success was far from perfect: for the women who were unable to travel, the City could provide no hope.

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[25] *See id.*

[26] *See* Grimes & Brandon, *supra* note 18 at 23. Even at the time, legal abortion was an extremely safe procedure (and it is even safer today). However, as the small chance that something will go wrong increases with each week of gestation, any delay adds to the health risks. *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, slip op. at 23 (7th Cir. 2015).

III. H.B.2 and Laws Like It Threaten to Revive the Dangers of the Past and Export the Obligations of Reproductive Care to Clinics and Hospitals in a Few Isolated Cities and Metropolitan Areas.

The constitutional right to abortion cannot be meaningful if abortion services are offered only in a few cities, counties, and metropolitan areas. Amici each have a unique perspective on the impact of recent abortion restrictions, but we share one basic insight: the restrictions are affecting our residents and other women traveling to our cities and counties to access abortion services.

- Madison is one of only three cities in Wisconsin (along with Appleton and Milwaukee) with clinics providing abortion services. The new Wisconsin law restricting abortion access that was recently declared unconstitutional in *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), would have shut down two and perhaps more of these healthcare facilities. The remaining clinics would likely have faced more patients, and some patients would have been forced to drive longer distances to reach a clinic.

- The City and County of San Francisco, through the Women's Options Center at San Francisco General Hospital, offers high-quality abortion care and family

planning services. This public center has seen patients from Texas who were unable to access timely care locally, and who found care more accessible at San Francisco's center than in their home state, thousands of miles away. If more states were to enact Texas-style restrictions on the ability of clinics to provide abortion care, San Francisco's Women's Options Center would likely see more patients who reside in those states and would otherwise be unable to access timely care.

- New York City is within 75 miles of Pennsylvania, and 450 miles of Ohio, states that have recently enacted restrictive abortion laws. To this day, more than 5,000 women continue to travel to New York City every year to obtain the abortion services unavailable to them at home.[27] And those numbers would only increase if clinic closures in other states continue.

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[27] *See* N.Y. City Dep't of Health & Mental Hygiene, *Summary of Vital Statistics 2013: Supplemental Data Tables*, at 50 & tbl. PO13 (Feb. 2015), http://on.nyc.gov/1Mk0h58; Lizza, *supra* note 13; Debbie Nathan, *The New Underground Railroad*, N.Y. Magazine (Dec. 12, 2005), http://nym.ag/1NAvvXB.

- The City of Baltimore is home to one of the largest abortion providers in the State of Maryland, where abortion services are relatively accessible. But two of Maryland's neighboring states, Pennsylvania and Virginia, have enacted abortion restrictions that have closed previously open clinics. Those laws can cause Baltimore's health services to become overwhelmed. A dramatic influx of women seeking abortions from other states would necessarily cause longer waiting periods and otherwise threaten the quality of reproductive health services for Baltimore women and those who travel there.

The practical result of the Texas law confirms the impact on cities and counties where abortion services remain available. The ten or fewer clinics that would remain in Texas if H.B.2 is permitted to stand would be unable to meet the statewide demand for the over five million women of

childbearing age in Texas.[28] Even without full implementation of the law, abortion providers in Texas are already overwhelmed by the displaced demand.[29] Houston, for example, is one of the four metropolitan areas in Texas that would still provide access to abortion services after H.B.2. With H.B.2 just partially implemented, the number of abortion clinics in Houston has already fallen from ten to two, at the same time that Houston is being asked to expand its patient population to cover women from all across Texas who no longer have access to abortion services locally.[30]

As history repeats itself, wait times in Texas have increased as clinics struggle to meet increased needs while maintaining quality of care. For example, in Austin, part of Travis County, wait times increased to as long as 23 days in some

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[28] *See* J.A. 238; Daniel Grossman, *et al.*, *Abortion Wait Times in Texas: The Shrinking Capacity of Facilities and the Potential Impact of Closing Non-ACS Clinics*, at 2-6 (Oct. 5, 2015), http://bit.ly/1ZfQExG. By comparison, New York State, which has less than three-quarters of the population and one-fifth of the land area of Texas, has more than 90 abortion clinics and 110 other abortion providers. *See State Facts about Abortion: New York*, Guttmacher Inst., at 2 (2014), http://bit.ly/1Yqoiib.

[29] *See* Brian M. Rosenthal & Mark Collette, *Women Seeking Abortions Scramble to Find Places to Go*, Houston Chronicle (Oct. 10, 2014), http://bit.ly/ZVxlRk.

[30] *See* J.A. 229.

facilities.[31] The longer the waiting list, the later women get abortions, adding to the risks.[32] Some women are unable to obtain abortions at all because the delay pushes them past the point that some clinics will perform lawful abortions, or they are pushed out of the zone of lawful abortions altogether.[33]

Some Texan women will be able to afford the costs of out-of-state travel. But many adjacent states have also enacted laws that restrict access or have the practical effect of reducing the number of available abortion providers.[34] Amici's experience shows how out-of-state providers are strained by the influx of non-resident patients, impairing the availability of care and burdening the reproductive rights of residents and non-residents.

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[31] *See* Grossman, *supra* note 28 at 2.

[32] *See id.* at 2-6.

[33] *See Schimel*, *supra* note 26 at 19.

[34] *See State Facts about Abortion: Arkansas*, Guttmacher Inst., at 2 (2014), http://bit.ly/1YZUsqc; *State Facts about Abortion: Louisiana*, Guttmacher Inst., at 2 (2014), http://bit.ly/1Qv2pPG; *State Facts about Abortion: Oklahoma*, Guttmacher Inst., at 2 (2014), http://bit.ly/1VzwbBQ; Julia Glum, *After Texas Abortion Law, Women Head to Louisiana for Medical Procedure, But that Soon Might Not Be an Option*, Int'l Bus. Times (June 10, 2015), http://bit.ly/1Mlkjwh.

And for hundreds of thousands of Texan women, out-of-state travel will not be an option. More than 1.3 million adult women in Texas live in poverty.[35] For them, and for teenage women with even fewer resources, the expenses of a round-trip ticket to a far-away jurisdiction, lodging, and childcare, and the prospect of lost wages, rapidly reaches a tipping point where the costs become prohibitive.[36]

More fundamentally, when Texas defends H.B.2 on the basis that some fraction of Texan women will be able to travel out-of-state, it gets the law precisely backwards. As the Seventh Circuit has recognized, the notion that "the harm to a constitutional right can be measured by the extent to which it can be exercised in another jurisdiction is a profoundly mistaken assumption."[37] If anything, when states force their citizens to travel to distant jurisdictions to secure basic reproductive care, it unduly burdens both the traveling women and the women living in the receiving jurisdictions, all of whom suffer from delays in care caused by skyrocketing demand.

The real-world impact of H.B.2 also cannot be fully understood if one entertains the fiction that

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[35] *See Adult Poverty Rate by Gender (2014)*, Henry J. Kaiser Family Found. (2015), http://kaiserf.am/1sY7hid.

[36] *Cf. Schimel*, *supra* note 26 at 22.

[37] *Id.* at 20 (internal notations omitted).

Texas stands alone. As more states join Texas in enacting restrictive abortion laws (and many have), the burdens on women will increase exponentially. Sanctioning laws like H.B.2 will provide a blueprint for states to reduce abortion access in America to isolated pockets of reproductive autonomy where abortion services remain available, as in amici's cities and counties, that are potentially out of reach for the vast majority of women living elsewhere. Women's right to reproductive freedom should not depend on the happenstance of geography or the ability to travel hundreds of miles to obtain safe and legal abortion services.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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